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No. 1081

In the Supreme Court of the United States

OCTOBER TERM, 1967

DAVID W. BROWN, PETITIONER

v.

HON. CLARK M. CLIFFORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The opinion of the district court (Pet. App. 9a-23a) is reported at 263 F. Supp. 686.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1967. The petition for a writ of certiorari was filed on February 5, 1968. The jur-

isdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures used by the Army to pass upon servicemen's claims for discharge as conscientious objectors comport with due process.

2. Whether the Army's denial of petitioner's application for discharge was arbitrary or capricious.

3. Whether petitioner's resort to the civil courts on habeas corpus is premature in light of the fact that a proceeding in which his conscientious objection claim may be presented is currently pending before an Army Board of Review.

STATEMENT

Petitioner brought this action seeking a writ of habeas corpus ordering his discharge from the Army on the ground that the Army improperly refused to discharge him as a conscientious objector. The United States District Court for the District of New Jersey denied relief and the court of appeals affirmed, one judge dissenting.

The relevant facts show that when petitioner was a twenty year old student at Yale, he voluntarily enlisted in the United States Army for a period of three years, on May 17, 1966. He reported to Fort Dix for active training in the early part of June 1966. After two weeks of basic training, petitioner invoked Army Regulation (AR) 635-20 [1] and sub-

[1] AR 635-20 (Pet. App. 42a-45a) was promulgated by the Army to implement the policy set forth in Department of

mitted an application for discharge as a conscientious objector. In his application, petitioner alleged that he believed in a Supreme Being, and that the belief which prompted his conscientious objector claim derived from both religious and pacifist training. He alleged that his religious training consisted of membership in the Methodist Church [2] and participation in "enumerical [*sic*; ecumenical?] youth activities in high school" (A. 5). He listed pacifist training separately, and set forth that it consisted of "(1) Personal contact with professed pacifists" (A. 5), "(2) Some literature from Sane and the World Federalists" (A. 6), and "(3) Contact with peace groups at Yale" including "Alternative" and "Americans for Reappraisal of Far Eastern Policy" (A. 6). The belief which prompted his conscientious objection application was also derived from his introductory reading of "* * * *Understanding Media; The Extension of Man*; by Marshall MacLuham [*sic*], which indicates new possibilities for and tendencies towards peaceful situations [*sic*; solutions?] to international disputes" (A. 6). Finally, petitioner alleged that his conscientious objection to war

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Defense Directive (DOD) 1300.6 (Pet. App. 26a-41a), dealing with the consideration of conscientious objector claims by persons lawfully inducted into the military services.

[2] As set forth in petitioner's application, the official statement or creed of the Methodist Church recognizes that there will be differences of opinion as to participation in war, and the Church supports the conscientious views of both participant and non-participant (A. 8-9). ("A." designates the Appendix filed by petitioner in the court below, and "H." the hearing on the habeas corpus petition, both of which have been filed with the Clerk of this Court).

in any form fully crystallized in the few weeks following enlistment when basic training gave him a "* * * new awareness of the destructive mission of the Army" (A. 6). Submitted with the application were letters from an Assistant Methodist Chaplain at Yale University, the Chaplain of The Wesley Foundation, petitioner's pastor, petitioner's wife, and some friends, all of whom stated their belief that petitioner's application was motivated by sincere religious conviction (A. 12, 13, 14-15, 16-17, 18-19). Petitioner also tendered the report of the Brigade Chaplain who had interviewed petitioner in accordance with AR 635-20. On the basis of his "extensive counseling" with petitioner, the Chaplain concluded that petitioner's beliefs, "* * * though sincere, are based on contacts he has had with Pacifistic Organizations and individuals rather than on Religious Convictions." (A. 10).

After an interview, petitioner's company commander concluded (A. 28):

> * * * prior to his enlistment into the military service, and since his commencement of basic training, Brown has been subjected to reading numerous papers and pamphlets concerning the "Pacifist Program" currently being demonstrated in this country.
>
> 3. In addition his beliefs are mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs.

On the basis of the Chaplain's report and his own observations, and in accordance with the established procedures, petitioner's company commander then

recommended that the application be disapproved. Petitioner's battalion commander concurred in this recommendation (A. 27), as did his brigade commander (A. 27) and the Base Commander (A. 26). The Commanding General, First Army, joined in recommending disapproval, listing as his ground the conclusion that petitioner's conscientious beliefs had crystallized prior to enlistment, which under AR 635-20, paragraph 3b and Part III. C of DOD 1300.6, made him ineligible to apply for a discharge (A. 25). Thereafter, as required by Department of Defense Directive (DOD) 1300.6, Part V. C (3) (Pet. App. 34), the Secretary of the Army forwarded petitioner's application and personnel file to the Director of the Selective Service System for an advisory opinion concerning his proper classification.[3] The Director advised that petitioner would not be classified as a conscientious objector if he were being considered for induction. On or about October 6, 1966, petitioner was notified that the Adjutant-General, in the name of the Secretary of the Army, had rejected his application (A. 24; Pet. 4-5).

On October 7, 1966, petitioner was ordered to draw combat training equipment; when he refused he was charged with failure to obey a lawful order of a noncommissioned officer, in violation of Article 91, Uniform Code of Military Justice (10 U.S.C. 891). Tried and convicted on that charge by a special court-mar-

[3] The advisory opinion is requested in part because of the objective of applying uniform criteria to these claims whether made by civilians or servicemen, and in part because, for those who have served less than 180 days, release from the Army will not relieve them from liability to the draft.

tial, he was sentenced to confinement for three months and forfeiture of $37.00 per month of his pay, but execution of the sentence was suspended. On October 17, petitioner failed to obey a similar order by a commissioned officer in violation of Article 90, Uniform Code of Military Justice (10 U.S.C. 890). Instead of a second court-martial, the suspension of the sentence adjudged by the first court-martial was vacated and petitioner entered confinement on November 16, 1966.[4]

On November 29, 1966, petitioner filed a petition for a writ of habeas corpus alleging, *inter alia*, that the denial of his application for a discharge as a conscientious objector was in violation of the relevant provisions of the Universal Military Training and Service Act, the Department of Defense Directive, and the Army Regulations (50 App. U.S.C. 456(j), DOD 1300.6 and AR 635-20); that the Army's determination also violated due process because it was arbitrary and without any basis in fact; that it violated due process because petitioner was not afforded an opportunity for a hearing and was not advised of the grounds upon which his application was denied; and that he was denied equal protection because the procedure used by the Army in processing conscientious objector claims irrationally omitted hearing rights accorded by the Selective Service System in passing upon pre-induction claims.[5]

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[4] During the pendency of the instant proceedings petitioner violated a third order and was sentenced to imprisonment for 18 months at Fort Leavenworth, Kansas.

[5] We are lodging a copy of the petition for a writ of habeas corpus with the Clerk of this Court.

On January 31, 1967, the district court denied the application for the writ. The court denied petitioner's procedural claims on the merits, concluding that while the procedures used by the Army to process such claims by military personnel—the procedures followed in this case—were not the same as the statutory procedures followed by the Selective Service System in processing civilian claims, the difference was reasonably justified by the peculiar needs of military order and discipline. *Brown* v. *McNamara*, 263 F. Supp. 686, 691; Pet. App. 17a-18a. The court declined, however, to review the factual adequacy of the Secretary's determination that petitioner did not qualify for the exemption. It reasoned that any added safeguards that would be provided by acceptance of jurisdiction to inquire into such particularized questions were "outweighed by the burden on the military which would result". Because of the Army's policy of assigning an applicant to non-combatant duties pending final action on his conscientious objector claim, the court concluded that protracted judicial litigation "could seriously disrupt the internal operations of the military" by keeping "part of what is supposed to be our active force immobile and entangled in litigation." 263 F. Supp. at 692; Pet. App. 19a-21a.

On appeal, Judge Van Dusen, writing the opinion of the court (Pet. App. 1a-6a), agreed with the district court on the due process question, but held that a federal court has jurisdiction to review the validity of the Army's denial of a conscientious objector claim,

at least to the limited extent of determining whether the denial was arbitrary, capricious or irrational. On the substantive merits, he concluded that there was "sufficient evidence" that the Army had not acted arbitrarily in refusing to discharge petitioner. He noted several factors (Pet. App. 5a-6a): (1) that the advisory opinion of the Director of Selective Service stated that the system would not recognize petitioner as a conscientious objector; (2) that the service regulations do not guarantee that even acceptance of a conscientious objector claim will result in discharge, since such claims will be recognized only "to the extent practicable and equitable", and will be denied automatically if the conscientious objection existed before entry into the Army;[6] (3) that petitioner first raised his claim six weeks after his voluntary enlistment in the Army and two weeks after the commencement of basic training; and (4) that there was "affirmative evidence" indicating that petitioner's conscientious objection was not based upon religious grounds.[7] Judge Van Dusen concluded that, in this context, there was no reason for the judicial power to interfere with such appellate procedures as may be available to petitioner within the Army (Pet. 6a).

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[6] See DOD 1300.6 (Pet. 26a-27a); AR 635-20 (Pet. App. 42a).

[7] Contrary to the assertions in the petition (Pet. 7, 8), the court below did not purport to rest its decision solely on the ground that petitioner's beliefs were based "in part" on non-religious factors. As indicated in the text, it found that there were various factors which precluded a holding that the determination made by the military authorities was arbitrary.

Chief Judge Staley, in a concurring opinion, agreed that the Army procedures were consistent with due process, but concluded, as had the district court, "that federal courts should refuse to accept subject matter jurisdiction to pass on the factual adequacy of the Army's decision" (Pet. App. 6a-7a). In dissent, Judge Maris agreed with Judge Van Dusen "that the federal courts have power to review the substantive elements of the military proceedings" but was of the view that the Army had made an erroneous assumption that since petitioner's beliefs were based on contacts with pacifist persons or organizations, they were of necessity not "religious beliefs" (Pet. App. 7a-8a).

ARGUMENT

1. Petitioner charges that the "procedures established by AR 635-20 for the processing, evaluation and adjudication of applications for conscientious objector status are totally devoid of minimum standards of due process * * *" (Pet. 12). In determining whether this position has any substance, it is important to view these procedures in the context in which they are used. In this light it becomes apparent that the provisions for protracted hearings and appeals appropriate for resolution of such claims when made by a civilian are unsuited to the consideration of a conscientious objection application by a serviceman on active duty.

We preface these remarks by noting that, unlike the civilian who has a statutory right to exemption if he establishes his conscientious objection claim (*Estep*

v. *United States*, 327 U.S. 114), no statute creates such a right for those already within the military service. The Army procedures here in issue reflect an exercise of Executive discretion. The Department of Defense Directive announcing this policy cautions that no member of the Armed Forces is entitled to be discharged prior to the expiration of his term of service, and that the decision whether to release a soldier who develops conscientious objection to war in any form "is discretionary with the service concerned, based on judgment of the facts and circumstances in the case" (Pet. App. 26a-27a). Thus even "bona fide conscientious objection" by servicemen "will be recognized [only] to the extent practicable and equitable" (Pet. App. 27a).[8]

In establishing the procedures by which the Army will undertake to consider these claims, the Executive was entitled to rely on the settled principle that the organization, administration, and discipline of the military forces are entrusted to the sound discretion of the Commander-in-Chief and his subordinates. As this Court has stated, *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94:

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[8] Notwithstanding petitioner's suggestion to the contrary (Pet. 14-15), it has been consistently held that exemption from military service because of religious scruples is a matter of legislative choice and not a constitutional imperative. See, *e.g.*, *Fleming* v. *United States*, 344 F. 2d 912 (C.A. 10); *Clark* v. *United States*, 236 F. 2d 13 (C.A. 9), certiorari denied, 352 U.S. 882; *United States* v. *Kenstler*, 250 F. Supp. 833, 834 (W.D. Pa.). Certainly, no different rule should be applicable to one who first raises a conscientious objection claim after he has enlisted in the Army.

> * * * judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters. * * *

We do not mean to suggest that any procedural system—no matter how restrictively or unevenly applied—would be within the range of permissible choices by the Executive;[9] we urge only that the validity of the system presently embodied in AR 635-20 should be tested by considerations which take into account the peculiar needs of the military system for which these procedures were designed. In this light—as both courts below ruled—the Army system in issue satisfies due process. An applicant is afforded full opportunity to present the basis of his claim in written form, and to file such other information as he deems pertinent to that claim. Under AR 635-20, paragraph 4c, each applicant is personally interviewed by the Brigade Chaplain, and in the present case petitioner was also interviewed by his company commander. The need to maintain our active military

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[9] By the same token, an exercise of military authority in contravention of an express statutory scheme would not be allowed to stand. *Harmon* v. *Brucker*, 355 U.S. 579 (the Secretary of the Army improperly issued less than an "honorable" discharge in excess of his statutory power).

forces in a state of operational integrity precludes the use of adversary hearings and extensive appellate procedures in determining whether a particular soldier should be released from the service. The delays invariably attendant on processes appropriate in civil litigation warrant different procedures in the military, since the period of the soldier's obligation is limited and the Army assigns him to non-combatant duties while his claim is pending. The absence of a formalized hearing requirement reflects the fact that the conscientious objector discharge procedure applies equally to the soldier on the "front line" and the soldier in basic training. In sum, the formal procedures adopted by the Army gave petitioner the opportunity to make known the basis of his claim and to adduce personal and documentary support for it, while also permitting a fair and expeditious decision to be made without serious disruption of military training and operations.

2. The Court need not reach the broad issue of whether the civil courts should ever assert jurisdiction to re-evaluate the factual basis of the Army's denial of a conscientious objection claim.[10] Assuming, *arguendo*, that there should be such review, the standard of review adopted and applied by Judge Van Dusen in this case—whether the Army's decision was "arbitrary,

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[10] As noted, Judge Staley, in his concurring opinion below, concluded that courts should never exercise reviewing authority on the theory that "the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the separation of powers" (Pet. App. 7a). The district court came to the same conclusion (see Pet. App. 19a-23a).

or capricious or irrational" (Pet. App. 5a)—surely meets minimal constitutional requirements. Indeed, only a very limited review is available in the case of a challenge by a civilian to a classification by Selective Service authorities. *Estep* v. *United States*, 327 U.S. 114, 122-123.

The basic question to be resolved under such a standard is whether the Army could rationally conclude that petitioner was not entitled to discharge because his convictions pre-dated his enlistment, or did not warrant separation from the service, or were not sincerely based on his personal religious beliefs. Cf. *United States* v. *Seeger*, 380 U.S. 163, 184.[11] We

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[11] The sincerity of the belief is made a crucial element in the Army scheme. See Department of Defense Directive 1300.6, Part III. E (Pet. App. 28a). Moreover, it is entirely clear from the context of the hearing on the habeas corpus petition that the government conceded the sincerity of petitioner's belief only for the purpose of making a jurisdictional argument (see H. 26 *et seq.*).

The petition (Pet. 9) recites that in the district court the government conceded the sincerity of petitioner's belief in a Supreme Being. From this the petition erroneously suggests that the only issue in the case, then, is whether petitioner's "proof of religious training and belief was rebutted by *any* evidence" in the military process. We take issue with this statement; the government's refusal to contest the sincerity of petitioner's general religious beliefs is hardly support for the conclusion that we concede that in fact these beliefs motivated his opposition to war. The issues are more complex than the petition endeavors to make them, for in addition to the question whether there was "any evidence" to support a conclusion that petitioner's pacificism was the result of political and social theories rather than his belief in a Supreme Being, there are also questions of whether his opposition to war—whatever its origin—arose more than a few weeks before he sought discharge and whether it would in any event have been "practicable and equitable" to recognize his claim.

submit, as Judge Van Dusen held (Pet. App. 5a-6a), that there was adequate evidence to lay to rest any claim of arbitrariness. The Brigade Chaplain, after extensive consultation, concluded that petitioner's opposition derived solely from pacifist beliefs, rather than from religious beliefs. Likewise, petitioner's company commander agreed that there was a lack of sincerity in the claim that his objection to war was religiously motivated.[12]

We submit also that the Army was entitled to take into account, in assessing the origin and sincerity of petitioner's claim, that it was alleged to have matured "in light of new awareness of the destructive mission of the Army" (A. 6), after only two weeks of basic training. Moreover, in accord with the Defense Department Directive (D.O.D. 1300.6, Part V. C (3)), an advisory opinion was obtained from the Selective Service System to the effect that petitioner would not be classified as a conscientious objector if he were being considered for induction.[13]

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[12] Petitioner reads the company commander's statement as showing that the denial was based on the fact that petitioner enjoyed pacifist beliefs *as well as* religious beliefs, and argues that the recommendation was thus improper. We think it is clear, as did Judge Van Dusen (Pet. App. 6a), that the purport of the company commander's entire statement was that he disbelieved the sincerity of petitioner's claim that his opposition to war stemmed from religious beliefs.

[13] While Judge Maris apparently agreed that the Army could find that petitioner's opposition to war stemmed from the teachings of pacifist groups and individuals, he nevertheless dissented on the ground that there was no showing that the pacifist groups were not in fact religiously motivated (Pet. App. 7a-8a). Of course pacifists may be motivated by re-

It is also clear from petitioner's own application that all of the religious training to which he referred as responsible for his beliefs occurred prior to his enlistment in the Army. Certainly, in such a case one cannot characterize as irrational the conclusion reached by the military authorities that petitioner did not meet the standard of the regulations.[14]

In sum, Judge Van Dusen properly concluded that there was some "affirmative evidence" (Pet. App. 6a, n. 7) showing the insincerity of petitioner's claim, and showing that the Army's denial was neither arbitrary nor capricious.

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ligious as well as political or social theories, but this abstract possibility does not imply that the handling of petitioner's claim was unfair. We note first that petitioner himself explicitly distinguished his "Religious training" from his "Pacifist training" (A. 5-6). Implicit in Judge Maris' approach is what we submit is the erroneous assumption that the Army had to prove in fact, after obtaining the conclusions of the chaplain and the company commander that petitioner's opposition stemmed from pacifist contacts, that these pacifist groups were not religiously motivated. Apart from whether concepts of official notice would have permitted the Army to conclude that the pacifist groups listed by petitioner—Sane, World Federalists, Alternative, Americans for Reappraisal of Far Eastern Policy (A. 6)—are political action organizations, we suggest that it is not unreasonable to expect an applicant who contends that his contacts with pacifist groups demonstrate that his opposition to war is based on religious convictions should offer some explanation of why he distinguished them from his "Religious Training."

[14] In accord with the policy set forth in Department of Defense Directive 1300.6, Part III. C, AR 635-20, paragraph 3b specifically provides that requests for discharge will not be entertained when based solely on conscientious objection which existed, but which was not claimed, prior to induction, enlistment, or entry on active duty.

3. We also note that an appeal from petitioner's latest court-martial is presently pending before the Army Board of Review. Although counsel for petitioner in that proceeding has not yet filed a specification of errors, there is no authoritative determination, so far as we are aware, that would preclude the argument before the Board that petitioner's conscientious objection claim was erroneously denied and that this circumstance bears on his failure to obey the otherwise lawful order. See *United States* v. *Prendergrass*, U.S.C.M.A., No. 20,514, Feb. 16, 1968. Thus, there is also a serious question as to the ripeness of petitioner's claim to review in the civil courts.[15] As Judge Van Dusen observed, petitioner's claim neither involves such unique factors, nor demonstrates such a miscarriage of justice, as to warrant immediate judicial intervention in face of the availability of further review within the military system.[16]

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[15] We are aware, of course, that a successful presentation of this defense before the Army Board of Review would not automatically entitle petitioner to the full relief he now requests—*i.e.*, discharge from the Army. However, in the event petitioner's defense—that he cannot be compelled to obey any military orders because of his religious scruples—is successful, the Army would have no practical alternative but to grant petitioner a discharge.

[16] The matter of exhaustion of remedies was urged before the district court, but was not considered in light of its position of judicial non-reviewability. (See Pet. App. 23a, n. 5). Neither Chief Judge Staley nor Judge Maris had occasion to refer to the matter in their opinions.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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